UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 25-CA-092145

Raytheon Network Centric Systems,

and

United Steel, Paper and Forestry,
Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers

International Union, AFL-CIO, CLC.

RESPONDENT RAYTHEON NETWORK CENTRIC SYSTEM'S
REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ'S DECISION

Dated: January 28, 2014

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Respondent, Raytheon Network Centric Systems, Inc. ("Raytheon" or "Respondent"), replies to points argued by Counsel for the General Counsel ("General Counsel") and the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union AFL-CIO-CLC ("Charging Party" or the "Union").

I. INTRODUCTION

Effective January 1, 2013, Raytheon changed the health insurance benefits of all 65,000 employees covered by the Raytheon United Benefits Program ("Raytheon Plan" or "Plan"), including the 35 bargaining unit employees in Fort Wayne (and employees in 18 other bargaining units). The benefit changes were similar in kind and degree to those Raytheon made each of the prior 11 years, were made on the same day as in each of the previous 11 years, and were expressly authorized by Plan language that has not expired and does not conflict with the parties' expired collective bargaining agreement ("CBA"). Nevertheless, the General Counsel and the Union claim, and the Administrative Law Judge ("ALJ") found, that Raytheon violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "Act"). They erroneously focus on the waiver doctrine and Board law holding that "Management Rights" clauses do not survive expiration of a CBA. Raytheon's actions were not predicated on a Management Rights clause, but the parties' longstanding practice, which arose out of specific contract language providing for pass through benefits "from year-to-year" and survived expiration of the CBA. Raytheon did not violate the Act, but implemented changes "in line with [its] long-standing practice" as "a mere continuation of the status quo." *NLRB v. Katz*, 369 U.S 736, 745-46 (1962).

The ALJ, the General Counsel, and the Union improperly attempt to limit *Katz* and its progeny, which fully support Raytheon's actions here. What is more, the ALJ ignored the Union's failure to propose any alternative insurance plan, and ordered Raytheon to provide

additional benefits in the form of static health care for 35 older employees who heavily utilize the benefits, and to absorb all of the associated costs, in direct contravention of the parties' agreement and Section 8(d) of the Act. Under the Union's theory of the case, which the ALJ adopted, Raytheon must provide these benefits with no recourse, other than to accept the Union's contract demands. The Board should overturn ALJ Fine's decision and hold that Raytheon did not violate Sections 8(a)(1) and (5) of the Act.

II. ARGUMENT

A. The General Counsel and Union ignore the realities of ALJ Fine's decision, and misconstrue the facts of the bargaining relationship between the parties.

ALJ Fine ignores the legal and practical realities and creates an untenable situation for employers like Raytheon that offer company-wide benefit plans (and concomitant cost savings to their unionized employees). More importantly, contrary to the bedrock principles of Section 8(d) of the Act, ALJ Fine forces upon Raytheon terms and conditions of employment for bargaining unit employees to which Raytheon never agreed, never contemplated, and from which Raytheon has no recourse until a new CBA is ratified. The ALJ does this despite the fact that the Union has not, to this day, offered an alternative health care proposal and refuses to contemplate any health care arrangement that is not the Raytheon Plan minus the inextricable pass through language *found in the Plan*. In fact, Judge Fine ordered Raytheon to breach the Plan—to provide benefits on terms other than as specified in the Raytheon Plan to which the Union agreed and that specifically authorizes Raytheon to modify the plan on a yearly basis, in exchange for coverage.

Consequently, the ALJ creates a Hobson's choice for Raytheon and authorizes the Union to use a take it or leave it approach to health care to the detriment of all other contract issues. The Union argues, and ALJ Fine agreed, that under the *McClatchy Newspapers* line of cases (321

NLRB 1045 (1990) and 321 NLRB 1386 (1996)), if the changes contemplated by a company encompass managerial discretion, such as the health benefit changes here, the employer cannot implement them if the parties reach impasse. If the Board agrees with the ALJ, the General Counsel, and the Union that no discretionary practice, regardless of the scope of discretion historically exercised, can ever constitute a valid past practice, the Board will invalidate over 50 years of Board law holding that past practice can include discretionary changes. Such a decision coupled with the Union's *McClatchy Newspapers* analysis would immeasurably impact bargaining relationships between unions and companies and give all negotiating power to the union where company-wide health care benefits are provided. The Union could hold out for health care on its own terms and the Respondent has no recourse to implement its health care proposal either pursuant to a past practice (if negotiations are ongoing and the annual open enrollment deadline is approaching) or through impasse. The Respondent will be forced to modify its plan and take on additional costs not bargained for, to maintain the Union's definition of the *status quo*.

The Union's position is particularly galling because it has never, despite multiple bargaining sessions, made a single proposal for alternative health care for its members. The Union's position has forever been—we want the Raytheon Plan benefits, but without the Plan language that allows the Respondent to provide the benefits at a competitive cost. Raytheon's position has always been that the Raytheon Plan and the pass through language contained within the Plan and referenced in the expired CBA are inextricably linked to one another. The Union rejected Raytheon's proposal but never proposed alternative health care options, despite repeated requests to do so.

The Union also asserts there is "no evidence presented that the reservation-of-rights clauses were thought of as inseparable from the benefits plan." (*Charging Party's Br.* at p. 29) That is false. Raytheon repeatedly told the Union the right to change the benefits was critical. The record evidence shows Raytheon made it clear from day one that its health care proposal was based on the continued adherence to the terms of the plan document, including pass through on a year-to-year basis—the right to change the benefits every year. In addition, over the 11 years covered by the three prior CBAs, Raytheon linked access to its discounted benefit plan (discounted for the 35 member bargaining unit because of the 65,000 Raytheon employee participants) to acceptance of the entire Raytheon Plan, which contains pass through language.[1]

Raytheon is entitled, indeed, obligated, to comply with the CBA the parties' bargained in 2009, until the parties agree on a new contract. The parties' bargain included key contractual provisions that fostered flexibility in health care. Raytheon agreed to provide health and welfare benefits to bargaining unit employees as long as Raytheon retained the ability, as specified in the Raytheon Plan, to modify health care benefits yearly. During the term of the CBA, Raytheon could modify those benefits at will, consistent with the CBA and Plan language. It did not, however, do so. Instead, Raytheon exercised the right once per year, during the open enrollment period, and used its discretion to make changes of similar kind and degree to the Raytheon Plan, year after year. These changes were consistent with the discretion contemplated in *Katz*, and put into practice by the Board in *Shell Oil Co.*, 149 NLRB 283 (1964), *Courier-Journal*, 342 NLRB 1093 (2004), and *Capitol Ford*, 343 NLRB 1058 (2004).

[1] It is the Union that lacks evidence to support its arguments, *e.g.*, claiming it demanded modification of the Plan language concerning pass through in 2012 because Raytheon had "exercised this right a bit too liberally." *Charging Party's Br.* at p. 27. There is no evidence in the record concerning the Union's rationale and it was never discussed during bargaining.

The Union and the General Counsel argue that based upon Raytheon's interpretation of the law, Respondent would have unfettered discretion to implement wholesale changes, which would be inimical to the bargaining process and would cause irreparable damage to the Union in the eyes of bargaining unit employees. This is a straw man, propped up by the Union and General Counsel. Raytheon's discretion is bounded by its practice. Following expiration of the CBA, Raytheon could not effect such wholesale changes to bargaining unit employees benefits, *e.g.*, eliminate spousal benefits, even if it eliminated the benefits for all 65,000 employees, because it has no history or practice of such wholesale changes.[2] Under the past practice doctrine, Raytheon is constrained to act in a manner similar in degree and kind, and, in this case, it is further limited to act once per year during open enrollment.

Once the CBA expired, Raytheon modified health care benefits for bargaining unit employees *because* it modified them for every other Raytheon employee. Raytheon was obligated to maintain the status quo based upon over a decade of past practice and as supported by the language of the Raytheon Plan and the CBA. The bargaining unit employees are intimately familiar with the open enrollment process and the yearly modifications of the Raytheon Plan and pricing. They are also familiar with Raytheon's yearly unilateral announcement of modifications to the Plan as they had received the same documents for open enrollment every year from 2000 through 2012. What is more, the record shows the 2013 benefits changes were consistent with past changes and well within the limitations on breadth and timing previously found lawful by the Board.

The Union has never proposed an alternative health care plan because one does not exist that provides the benefits and cost savings Raytheon provides to the bargaining unit because of

[2] During the term of the CBA, Raytheon could, of course, make such wholesale changes under the Plan language to which the Union agreed, as long as it made the changes for all 65,000 employees.

the leverage of having 65,000 employees on the same plan.[3] Finally, under the Union's theory and ALJ Fine's decision, Raytheon will be forced to do exactly what the Union claims has been avoided for the past 12 years. Raytheon will be forced to provide a separate health care plan to bargaining unit members and pay the increased costs for implementing a plan for only 35 employees. This is directly at odds with the parties' expired CBA and Raytheon's duty to maintain the status quo.

B. **The ALJ, General Counsel, and the Union Misinterpret and Improperly Limit *Katz* and Board Precedent.**

The General Counsel concedes that "Katz allows the Board the latitude to carve out situations where a unilateral change might be excused," but then asserts, without any analysis or authority, that *Courier-Journal* and *Capital Ford* are not carve outs; "[r]ather, they simply alter the meaning of past practice as envisioned by *Katz*." (General Counsel's Br. at 11, n. 11) The General Counsel, like the ALJ and the Union, is just plain wrong.

Indeed, in *Shell Oil*, decided just two years after *Katz*, the Board held the employer lawfully subcontracted work after the CBA expired because the unilateral exercise of that right was so well established that it became a term and condition of employment. *Shell Oil*, 149 NLRB at 289. The Board also noted the subcontracting did not materially vary "in kind or degree" from the subcontracting that occurred during the term of the CBA. *Id.* at 288. The benefit changes Raytheon made in 2013 did not materially vary "in kind or degree" from the changes it made every year from 2001 through 2012.

Shell Oil's approach to the preservation of the status quo has been accepted by the courts. In *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468 (6th Cir. 2002), the Sixth Circuit held

[3] The Union asserts Raytheon received the benefit of not having to provide a separate health care plan to bargaining unit members. (Charging Party's Br. at p. 27) This is a fallacy because if a separate health care plan had been negotiated in 2005 or 2009, Raytheon surely would have sought concessions in other areas, such as wages.

that the ability to act unilaterally may become part of the "past practice" of the parties, and that an employer does not alter the status quo by continuing that past practice following contract expiration:

> We interpret *Shell Oil* and its progeny as standing for the proposition that if an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the term of the CBA, then such a pattern of unilateral change becomes a "term and condition of employment," and that a similar unilateral change after the termination of the CBA is permissible to maintain the *status quo.* Thus, it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract.

Id. at 481. *See also Uforma/Shelby Business Forms v. NLRB*, 111 F.3d 1284 (6th Cir. 1997); *Litton Microwave Cooking Prods. Div. v. NLRB*, 868 F.2d 854, 858 (6th Cir. 1989) ("an examination of the history and practices of [the employer] and the Union in this case reveals that the Union believed that the . . . agreement permitted [the employer] to act unilaterally").

The tenets of *Katz*, put into practice in *Shell Oil*, were again followed by the Board in *EIS Brake Parts*, *Capitol Ford, and Courier-Journal*. In *EIS Brake Parts*, 331 NLRB No. 195 (2000), the Board reversed the ALJ and held that the employer's combining of jobs following the expiration of the CBA did not violate the Act despite the ALJ's finding that they "entailed the exercise of considerable discretion." The Board reasoned "[t]he management-rights clause of the parties' expired [CBA] gave the Respondent" the right to make changes in "production methods," and the "'status quo,' as understood by these parties for combining jobs . . . was defined by contract and well-established practice."

Similarly, in *Capitol Ford*, the NLRB held that a past practice arising under a CBA permitted a successor employer unilaterally to implement and subsequently modify a productivity bonus after the CBA expired. *Capitol Ford*, 343 NLRB at 1058 n.3. The NLRB

rejected the argument that the practice was no longer valid simply because the contract provision that authorized the practice had expired:

> Our colleague is correct in saying that a successor employer who does not adopt the predecessor's contract cannot rely upon the management rights clause of that contract to justify unilateral action. However, the instant case involves the predecessor's *practice* of acting unilaterally with respect to bonuses. The Respondent was privileged to continue that practice and did so in this case. Contrary to our colleague, the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice. *The Respondent's reliance* on its predecessor's *past practice is not dependent on the continued existence of the predecessor's collective bargaining agreement.*

Id. (emphasis added). *See also Beverly Health & Rehabilitation Services, Inc.* 346 NLRB 1319, 1333 n.5 (2006) (the Board declared that "without regard to whether the management-rights clause survived, the [employer] would be privileged to have made the unilateral changes at issue if [its] conduct was consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract."). Further, Raytheon relies on the language of the Plan, which provides foundation for the practice and did not expire, not the management rights clause of the expired CBA.

Finally, in *Courier-Journal,* the Board again approved an increase in the health insurance premiums to be paid by employees together with "a number of more far-reaching changes in the health care insurance benefits." *Courier-Journal,* 342 NLRB at 1093. There, the expired CBA contained a clause stating the employer "reserves the right to modify or terminate any (or all) benefits . . . at any time." *Id*. After the CBA expired, the employer:

> changed the amount of the employee contributions to healthcare premiums; modified the framework for determining employee contribution levels; switched from an insurance 'plan year' starting on July 1 to a plan year starting on January 1; introduced separate vision and dental coverage plans; terminated the bonuses paid to employees who chose to waive the [employer's] health care insurance; and substituted two plans with [one insurer] for the plans [the employer] had previously offered with [other insurers].

Id. at 1099.

Thus, contrary to the ALJ, the General Counsel, and the Union, the Board on numerous occasions has upheld employers' unilateral, discretionary changes following expiration of a CBA. The Board upheld these changes precisely because they were of a similar kind and degree to the parties' past practice. The General Counsel, Union, and ALJ attempt to distinguish these cases, but they cannot, nor can they show the decisions are at odds with *Katz*. *Katz* made clear that an employer's obligation to maintain the *status quo* may, in fact, require unilateral action if that is part of the *status quo.* *Katz*, 369 U.S at 745-46. Under *Katz*, an employer unilaterally may implement changes "in line with [its] long-standing practice" because such changes amount to "a mere continuation of the status quo." *Id.* at 746. Contrary to the ALJ, Union, and General Counsel, the benefit changes Raytheon made in 2013 constitute "a mere continuation of the status quo." *Id*.

III. CONCLUSION

For all of the foregoing reasons, the Board should reverse the ALJ and dismiss the Complaint against Respondent in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Respondent Raytheon Network Centric System's Reply Brief in Support of Exceptions to ALJ's Decision* has been served by electronic mail, this 28th day of January, 2014, upon:

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